No. 87-629

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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In The
Supreme Court of the United States
October Term, 1987

AMERICAN NATIONAL BANK & TRUST COMPANY, not individually, but solely as Trustee under Trust Number 33832, and PAXTON LANDFILL CORPORATION, an Illinois corporation,

Petitioners,

v.

CITY OF CHICAGO, a municipal Illinois corporation, and ZONING BOARD OF APPEALS FOR THE CITY OF CHICAGO,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent's Brief In Opposition is revealing, and proves all central points of the petition for writ of certiorari.

Petitioner ("Paxton") asserted the decision for which review is sought would deprive all Illinois citizens[1], who suffered loss of federal Constitutional rights in state administrative proceedings, of their Constitutional rights, unless action for administrative review was brought flawlessly in 35 days. Respondent brands the assertion "baseless", but reveals Paxton could have brought its action for vindication of its federal Constitutional rights after 35 days only "providing it [Paxton] had a live pending action."[2]

Petitioner asserted the decision for which review is sought is in conflict with applicable decisions of the United States Supreme Court and other federal courts of appeals, which support an exception that state law cannot govern under 28 U.S.C. Section 1738 where inconsistent with 42 U.S.C. Section 1983. Respondent argues no exception applies here, because Paxton had "full and fair opportunity" to litigate, but Respondent reveals that the dismissal of Paxton's action was ordered over a technicality of service requirements which could be satisfied within 35 days only, and that the dismissal has been held to be res judicata.[3]

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[1] And all citizens of the fifty states with similar laws.

[2] Compare Respondent's Brief at 4, lines 1-3, to its brief at 9, lines 10-13. Presumably, a "live pending action" is an action for administrative review, brought flawlessly, within 35 days, so as to be "live" and "pending".

[3] Compare Respondent's Brief at 7-8 to its brief at 5, lines 1-6. The opportunity to date has been neither "full" nor "fair".

Petitioner asserted the state appeals court decision was a decision of jurisdiction and not res judicata, as a matter of state law. Petitioner asserted the Seventh Circuit decision was a decision not of state law, but in spite of state law. Repondent argues the state courts would have treated the state court dismissal as res judicata,[4] as did the Seventh Circuit, but reveals that Illinois state courts

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[4] Respondent argues failure of service was a "mandatory" flaw, not a jurisdictional flaw. The statue underlying the petition and decisions below is Ill. Rev. Stat., ch. 110, section 3-103. Section 3-103 provides:

> Every action to review a final administrative decision shall be commenced by the filing of a complaint and the issuance of summons within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected thereby.

This statute requires that: (1) the *plaintiff* must file the review and all summonses within the 35-day period; and (2) the *clerk of the court* must then issue the summonses as filed, also within the 35-day period. The first requirement is the *mode of procedure* the *plaintiff* must pursue; the second, issuance of summonses after filing by plaintiff, is the *clerk's* obligation.

Repondent cites two cases, *City National Bank and Trust Co. v. Property Tax Appeal Board,* 92 Ill. 2d 378, 382 (1983); and *Cox v. Board of Police & Fire Commissioners,* 96 Ill. 2d 402, 403-04 (1983) for the proposition that failure of service is a "mandatory", not jurisdictional, flaw. Respondent confuses the first and second requirements of the statute.

In *City National* and *Cox*, the Illinois Supreme Court held that the second requirement, the *clerk's* issuance of summonses, is mandatory, not jurisdictional. Thus, failure of the *clerk's* obligation, because it is outside the plaintiff's control, can be overcome. *Id.*

But in *Fredman Brothers Furniture Co. v. Department of Revenue,* 109 Ill. 2d 202, 209-11, 486 N.E.2d 893, 895-96 (1985), the Illinois Supreme Court held the first requirement, *plaintiff's* mode of procedure, is jurisdictional. Quoting, "if the *mode of procedure* prescribed . . . is not strictly pursued, no jurisdiction is conferred on the [Illinois trial] court." *Id.* at 210, 486 N.E.2d at 896 (emphasis supplied).

would have allowed Paxton's action to have been refiled in state court up to a year later.

Paxton's Constitutional claims have never been heard on the merits in any court, state or federal. The decisions of the federal courts in refusing to hear the claims have been damaging to Paxton, to federal Constitutional rights, and to federal jurisprudence. Respectfully, the petition for writ of certiorari should be granted.

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